Office Supreme Court, U.S.
FILED
SEP 23 1983
ALEXANDER L. STEVAS,
CLERK

Nos. 83-285 and 83-5296

In the Supreme Court of the United States

OCTOBER TERM, 1983

STEPHEN KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

MICHAEL KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-285

STEPHEN KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 83-5296

MICHAEL KELLY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the court of appeals erred in reversing an order suppressing evidence.

On February 8, 1982, petitioners were charged in an indictment returned in the United States District Court for the Eastern District of Pennsylvania with conspiracy to manufacture, distribute, and possess with intent to distribute controlled substances, in violation of 21 U.S.C. 846, and with knowingly and intentionally using a telephone in facilitating the commission of a felony, in violation of 21 U.S.C.

843(b). In addition, petitioner Stephen Kelly was charged with using a firearm to commit a felony, in violation of 18 U.S.C. (Supp. V) 924(c)(1). Before trial, petitioners moved to suppress three taped conversations with one Edward Bencsik that were recorded with the latter's consent. On August 25, 1982, the district court suppressed the conversations as evidence on the ground Bencsik's consent to police monitoring of his conversations "was impermissibly clouded" by several factors: his possible drug use, his apprehension of physical harm from petitioners, the pressure from a friend, the assurance of help from law enforcement officials, and Bencsik's own "highly suggestible nature" (83-5296 Pet. App. 9a-20a). The court of appeals reversed in a split decision, concluding that the record clearly established that Bencsik had voluntarily consented to have his telephone conversations with petitioners recorded (83-285 Pet. App. 1-15; 708 F.2d 121).

Petitioners contend (83-5296 Pet. 10-15; 83-285 Pet. 15-28) that the court of appeals misapplied the clearly erroneous standard of review to factual findings of the district court. Whatever the merits of petitioners' contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed on appeal, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of

---

[1]It is now 19 months since the return of the indictment and over one year since the district court's suppression order. Further interlocutory review at this time would cause additional delay in trial of the charges against petitioners.

certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petitions for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

SEPTEMBER 1983

---

[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petitions. We will file a response on the merits if the Court requests.

DOJ-1983-09